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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 540

UNITED STATES OF AMERICA,

Petitioner,

v.

GRACE A. INGHAM, as Executrix of the Estate of Paul B. Ingham, deceased,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit was rendered on February 14, 1967 and is reported at 373 F. 2d 227 *sub. nom. Ingham* v. *Eastern Air Lines, Inc.** Petitioner's motion for a rehearing in said court

* The Opinion is set forth on pages 1A-27A of the Appendix of the Petition herein. "App." refers to the appendix to the petition for certiorari.

was denied on March 30, 1967 and judgment was entered on March 31, 1967.

The opinion of the United States District Court for the Eastern District of New York is not officially reported (App. 29a-62a).

Jurisdiction

Petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

Questions Presented

1. Where a Government air traffic controller, under a duty to communicate weather conditions to approaching aircraft, reported non-current, superseded and inaccurate information and failed to report accurate and available information which was disseminated by other similarly situated controllers indicating a deteriorating weather condition, is the Government exculpated from liability by the Federal Tort Claims Act "misrepresentation" exception?

2. Where a Federal Aviation Agency Air Traffic Control Procedures Manual section, when reasonably read, required the dissemination of information of weather changes, was the court below bound to accept a strained interpretation of that section asserted by agency employees but rebutted by the section's language and the conduct of other controllers on duty?

3. Where the district court and the court of appeals unanimously found that the Government's operational negligence proximately contributed to plaintiff's death, should this Court undertake a *de novo*, factual review?

Statement

Eastern Air Lines Flight 512 (hereinafter referred to as EAL 512) with 45 passengers aboard crashed while attempting to land at Idlewild International Airport, New York, on November 30, 1962. At the time of the crash, the runway was engulfed in a dense ground fog which impaired flight visibility during the approach and on the runway itself. Paul B. Ingham was one of the twenty-five persons who died as a result of the crash. His Executrix commenced an action against Eastern Air Lines and an action against the United States of America under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* A jury was waived in the case against Eastern and the district court tried the two *Ingham* actions together as a "test case" on issues of liability.

The district court determined that the negligence of both defendants proximately caused the crash.* The court held that a Federal Aviation Agency air traffic controller had failed to provide the crew of EAL 512 with complete, accurate, current and available weather information, and that that operational negligence was a proximate contributing cause of the crash.

The Court of Appeals for the Second Circuit unanimously concurred in the district court's findings that the controller had been given the current weather and that it was important to the crew "both in determining whether to attempt a landing and in preparing for the weather conditions most likely to be encountered near the runway" (App. 14a). It reaffirmed the Government's liability for

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* Eastern's liability was predicated upon the negligent approach and missed approach conducted by the crew. Eastern has not petitioned for certiorari and as to it the judgment is final. Therefore, Eastern's liability and the facts on which liability was found are not discussed except in the context of discussing the liability of the United States.

the operational negligence of an air traffic controller who it found had proximately caused the crash and resulting deaths, and it determined that it was not bound or persuaded by an "inordinately narrow", inflexible and unsafe interpretation of a Government operating manual advanced by several controllers (App. 13a).

The court of appeals considered and rejected three Tort Claims Act defenses asserted by the Government. As to the misrepresentation exception defense, 28 U.S.C. 2680(h), which is the only one raised in this petition, the court stated that if applied to the facts in this case, it would exempt the Government from tort liability for any operational negligence "that involved communications in any form" (App. 22a). Furthermore, it found no conflict between its decision and rulings in other circuits which applied the misrepresentation exception in cases involving financial transactions, flood control predictions and hurricane forecasts.

The facts concerning the negligence of the Government are set forth accurately and fully in the opinions of the court of appeals (App. 9a-19a) and the district court (App. 44a-54a) and in the district court's findings of fact (App. 60a-62a).

Reasons for Denying the Writ

The Government's petition advances artificial issues of law and a non-existent conflict among circuits in what is essentially a plea for a factual review of the evidence by this Court.

I

This is a simple case of operational negligence of an air traffic controller who failed to advise an approaching aircraft of existing weather conditions. The approach controller was informed of the existing weather conditions by

his superior. His duty was to act as a conduit and pass this weather information to approaching aircraft. The negligence consisted of his failure to relay the current weather information provided him to the approaching airliner and his transmission of non-current, superseded inaccurate, and incomplete weather information. Conceptually this case is the same as those which impose liability for the failure to warn one aircraft of the close proximity of another or the erroneous advice given one aircraft of the position of another. This case did not involve issues of policy, the exercise of discretionary responsibility, and "misrepresentation" in the sense intended by the Tort Claims Act. It simply involved negligence in the performance of a mechanical act.

The Tort Claims Act (28 U.S.C. 1346 *et seq.*), waived sovereign immunity for torts committed by governmental employees. In *Indian Towing Co.* v. *United States,* 350 U. S. 61 (1955), this Court stated:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not leave just treatment to the caprice and legislative burden of individual private laws." at 68.

In urging review based upon the "misrepresentation" exception in the Tort Claims Act (28 U.S.C. 2680[h]), the Government attempts to create a legal issue where none exists. To give weight to its claim, it urges the existence of an "apparent conflict" among the circuits. No conflict exists. The sole purpose of suggesting the existence of a conflict is to lead the Court into a thicket of factual review of evidence; evidence which was found by two courts to support liability on the part of the Government.

The decision by the United States to establish an air traffic control system involved an exercise of discretion and no liability can be based upon on that decision. *Dalehite* v. *United States,* 346 U. S. 15 (1952). However, once having made that decision, Government employees were bound to act in a reasonable manner and a failure to do so rendered the Government liable for omission or commission. *Indian Towing Co.* v. *U. S.,* 350 U. S. 61 (1965); *Rayonier, Inc.* v. *United States,* 352 U. S. 315 (1957).

In *Eastern Air Lines* v. *Union Trust Co.,* 350 U. S. 907 (1957), affirming 221 F. 2d 62 (D. C. Cir. 1955), the Government was held liable for a mid-air collision caused by the negligence of its air traffic controllers who cleared two aircraft to land on the same runway at the same time. The controllers knew the positions and courses of the two aircraft, but failed to relay the information to the aircraft and relayed inaccurate information. This was held to be operational negligence even though it involved an oral communication which inaccurately reported traffic conditions.

If the Government's unique approach to the "misrepresentation" exception is adopted herein, it would bar all claims against the federal government where the operational negligence involved communication, and would require overruling all such previous cases, including *Eastern Air Lines* v. *Union Trust Co., supra.* Such a sweeping interpretation of the Tort Claims Act is not called for by its language, was not intended by its drafters and would virtually destroy its liberalizing effect. The court of appeals below pointed to the limits of the "misrepresentation" exception, stating:

> "Nevertheless, the government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the government that involved communications in any form." (App. 22a)

Where the action complained of involves the negligent performance or failure to perform a simple act of reporting, there is no "misrepresentation" in the sense intended by the Tort Claims Act. Thus, the "misrepresentation" exception is inapplicable where traffic controllers failed to accurately report the positions and courses of two aircraft, *Eastern Air Lines* v. *Union Trust Co., supra;* it is inapplicable where the Coast Guard failed to properly maintain a lighthouse beacon which would warn vessels of the hazard to navigation, *Indian Towing Co.* v. *United States, supra;* and it is inapplicable here where the controller failed to inform an approaching aircraft of a weather report which had been provided to him for transmittal to aircraft.

It is true that the Government has been held not to be liable for "misrepresentation" in a number of distinguishable situations, largely those involving the element of judgment, of a financial or commercial rather than an operational character, or where the function being performed was governmental in character, directed primarily to the common weal and general public rather than to a private person and not suggesting comparable private liability.

Thus the "misrepresentation" exception has been applied, usually in addition to some other basis for non-liability on the part of the Government, to preclude liability for the prediction and forecast of floods and hurricanes, *National Manufacturing Co.* v. *United States,* 210 F. 2d 263 (4th Cir. 1954); *Carrier* v. *United States,* 369 F. 2d 323 (5th Cir. 1966), cert. denied 386 U. S. 1027; *Clark* v. *United States,* 218 F. 2d 446 (9th Cir. 1954); *Bartie* v. *United States,* 216 F. Supp. 10 (W. D. La. 1963), aff'd 326 F. 2d 754 (5th Cir.), cert. denied 379 U. S. 852 (1964); where financial loss has resulted from an FHA real estate appraisal, *United States* v. *Neustadt,* 366 U. S. 696 (1961); where there was an estimate of the oil production reserve capacity of certain land, *Jones* v. *United States,* 207 F. 2d 563 (2d Cir. 1953), cert. denied 347 U. S. 921 (1954); and

for an opinion that a herd of cattle had a communicable disease, *Hall* v. *United States*, 274 F. 2d 69 (10th Cir. 1959).

The distinction between cases involving business dealings of a financial or commercial nature and operational negligence of the type involved in the instant case is clearly enunciated by this Court in *United States* v. *Neustadt*, 366 U. S. 696 (1961), in which the Court said:

> "Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co. v. United States, 350 U. S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not 'arise out of * * * misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said, to involve an element of 'misrepresentation,' in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.'" 366 U. S. at 711, n. 26.

The Government contends that the court below limited both *Neustadt* and the "misrepresentation" exception to commercial-financial transactions. This is not so. The court simply held that both were inapplicable to the facts of this case. It found that the controller's failure to inform the aircraft of current weather conditions was akin to the Coast Guard failure in *Indian Towing* to warn vessels of the hazard through an operative lighthouse beacon.

Both cases involved a negligent failure on the part of the Government employees to perform an operational duty they had undertaken—to provide information and warnings to users of the airways and the waterways.

The Government points to two Ninth Circuit cases to show an "apparent conflict" with the instant case. *Clark* v. *United States,* 218 F. 2d 446 (9th Cir. 1954) held that there could be no recovery for loss of personal property caused by the failure of Government employees to predict the exact time flooding would cause a dam to break, and *DeLange* v. *United States,* 372 F. 2d 134 (9th Cir. 1967) involved an diagnostic opinion of a Government doctor. Neither *Clark* nor *DeLange* is in conflict with the decision below. *Clark* was primarily based upon a separate statute which precluded liability on the part of the United States for damage from floods or flood waters, 33 USCA § 702c, discussed at 218 F. 2d 451-452. Furthermore, like the other flood control and hurricane cases, it involved a function, governmental in character and directed to the general public, and without comparable private liability. See concurring opinion of Judge Johnsen, concurred in by Judge Sanborn, in *National Manufacturing Co.* v. *United States,* 210 F. 2d 263, 279-280 (4th Cir. 1954).

In *DeLange,* the plaintiff, a Government employee, consulted Government doctors who diagnosed her condition as syphilis. Plaintiff's exclusive remedy was under the Federal Employees Compensation Act, and the Court so held in a brief *Per Curiam* opinion. Its reference to the "misrepresentation" exception was unnecessary.

The Government, in its petition, does not cite *United Air Lines* v. *Weiner,* 335 F. 2d 379 (9th Cir.), cert. dismissed 379 U. S. 951 (1964), where it raised and the Ninth Circuit rejected the "misrepresentation" exception defense. The case involved a mid-air collision resulting from the negligent failure of the government controllers to in-

form two aircraft of their respective positions. The Court of Appeals for the Ninth Circuit stated:

> "The government's reliance on 28 U.S.C. Section 2680(h) relating to exemption from the Tort Claims Act of causes of action predicated upon misrepresentation is misplaced. This section applies to claims arising out of misrepresentation. *United States* v. *Neustadt*, 366 U. S. 696, 81 Sup. Ct. 1294, 6 L. Ed. 2d 614 (1960).
>
> Here the gravamen of the action is not misrepresentation but negligent performance of operational tasks, although such negligence consisted partly of a failure of a duty to warn. *Indian Towing, supra; United States* v. *White*, 211 F. 2d 79 (9th Cir. 1954); *Fair* v. *United States, supra; United States* (*Eastern Air Lines*) v. *Union Trust Company, supra.*" At page 398.

Thus, in urging the existence of an "apparent conflict", the Government's petition not only misreads the decision below, but fails to present the relevant Ninth Circuit case directly in point. There is no conflict between the circuits. Both courts agree that the failure to simply report a known hazard, although involving communication, is not the type of "misrepresentation" Section 2680(h) was intended to cover.

II

The Government's second contention relates to the findings of both courts below that the air traffic controller, in failing to give the latest accurate and available weather, had violated a regulation of the FAA contained in an FAA Air Traffic Control Procedures Manual. The regulation required that:

> "§ 265.2. At locations where official weather reports are obtained by the controllers through routine procedures and the ceiling and/or visibility is reported as

being at or below the highest 'circling minima' established for the airport concerned, a report of current weather conditions, and subsequent changes, as necessary, shall be transmitted as follows:

* * *

B. By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter * * *."

On the trial the Government presented a strained artificial interpretation of this manual provision through the testimony of some FAA employees. Their testimony was rebutted not only by the plain language of the regulation, but by the proof that other controllers had followed the proper procedure (15a).

Yet the Government contends that the court was obliged to blindly follow the "interpretation" given the manual provision by these FAA employees. Again the legal argument appears to be the vehicle through which the Government urges a factual review. The court below considered the provision in the factual context of this case and concluded the provision was designed to foster aviation safety by providing arriving aircraft with reports of "current weather and changes as necessary". It recognized how vital accurate and current weather information was to the crew of EAL 512 during the critical landing phase. It made a factual finding that "necessary" information was not reported and determined that "the inescapable conclusion is that the regulation was violated" (App. 21a). For this Court to conclude otherwise would require it to review the facts, reject the findings of both lower courts, and determine that the information was unnecessary.

The Court of Appeals as well as the District Court found that the government had undertaken the duty of reporting critically needed weather changes. The Government contends that these Courts misconstrued the manual since they

did not blindly follow the "inordinately narrow" interpretation of this regulation testified to by several controllers, an interpretation contrary to the language of the manual, contrary to the needs of air safety, and contrary to the procedures actually followed by three of the four controllers on duty at the time of the accident.

As the opinion indicates (11a-17a), the court below carefully considered this interpretation of the manual provision and rejected it for compelling reasons. Courts properly give great weight to a duly promulgated agency interpretation of a regulation since this has the effect of law and the public, aware of the interpretation, is assumed to act accordingly. But the respect given to administrative interpretations of regulations of this kind does not apply to interpretations of every agency manual, regulation or instruction establishing operating procedures, particularly when the interpretation is unpublished, offered on a trial in the form of oral testimony after the fact, and when it is contrary to the plain language of the provision. As to these, the courts are free to read manuals and interpret them in a reasonable manner and consistent with their purpose. *Miller* v. *United States,* 294 U. S. 435 (1935); *Smith* v. *Sutton,* 135 F. Supp. 805 (D. C. Cir. 1955). The interpretation of agency personnel and counsel is not binding on the courts. *Clemons* v. *United States,* 245 F. 2d 298 (6th Cir. 1957), and ambiguity should be resolved against the Government, *Cole* v. *Young,* 351 U. S. 536 (1955).

III

The final grounds urged for review is that the Government disagrees with the District Court and Court of Appeals findings that its negligence was a proximate cause of the crash. All that need be said is that this clearly seeks a review of the unanimous factual findings of the lower courts and such review is contrary to the policy of this Court. *Graver Mfg. Co.* v. *Linde,* 336 U. S. 271, 275 (1949).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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